SUPREME COURT, U. S.

No. 1231

APR 11 1968

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOE HENDREX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of aiding and abetting Raymond Jones (who was not charged in the indictment) in the illegal sale of narcotics and of receiving and concealing illegally imported narcotics (26 U.S.C. 4705(a); 21 U.S.C. 174). On January 20, 1967, he was sentenced to eight years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed *per curiam* (Pet. App. A).

The government's evidence showed that during the evening of March 13, 1966, narcotics agent McClaran telephoned petitioner at his home and asked him whether any narcotics were available. Petitioner told McClaran to come to his apartment (Tr. 6-7).[1] About an hour later McClaran arrived and met petitioner and Jones, with whom he had previous dealings in narcotics (Tr. 10, 22). Shortly thereafter Jones left the room. Petitioner and McClaran then had a conversation in which the agent agreed to buy thirteen packets of heroin for $75. Petitioner told McClaran he would "get his man * * * to take care of it". Petitioner left the room. A few moments later Jones entered, removed thirteen packets of heroin from his pockets, and handed them to McClaran. McClaran paid Jones $75 (Tr. 11). Petitioner re-entered the room after the transfer had taken place, while the narcotics were in McClaran's hands. He asked if everything was all right. After some further conversation, McClaran departed (Tr. 11, 20-21).

Petitioner testified that he had not been involved in the transaction.

1. Petitioner contends that his conviction should be reversed because there was insufficient evidence to corroborate his "admissions" (Pet. 7). However, petitioner's statements to McClaran at the time of the transaction were not after-the-fact admissions requiring corroboration, *Warszower* v. *United States*, 312 U.S. 342, 347-348; compare *Opper* v. *United States*, 348 U.S. 84; *Smith* v. *United States*, 348 U.S. 147;

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court.

Kelly v. *United States*, 246 F. 2d 864 (C.A. 10); they were part of the transaction itself. The evidence of petitioner's statements and negotiations with the agent followed immediately by the delivery of the narcotics by Jones is more than sufficient to sustain his conviction.

2. The trial judge charged on Count 2 that, if the jury should find beyond a reasonable doubt that petitioner possessed the narcotics, that was sufficient to justify conviction on the basis of the presumption contained in 21 U.S.C. 174 (Tr. 117). The court of appeals declined to consider petitioner's challenge to this instruction, since petitioner had received concurrent sentences and there was no possibility of parole. This course was proper. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; see *United States* v. *Romano*, 382 U.S. 136.

Moreover, petitioner's counsel did not object to this portion of the charge (Tr. 118). And since petitioner did not attempt to explain his possession of the narcotics the court's charge in this regard was not plain error.

3. Jones was called as a defense witness (Tr. 87-88). He refused to answer any questions pertaining to the substance of the prosecution and invoked the Fifth Amendment. Defense counsel brought out the fact that Jones had been subpoenaed to appear [2] and was then awaiting trial (Tr. 89-90). Apparently,

[2] The subpoena had been issued the previous day during the government's case. The trial judge, at the conclusion of the government's evidence, granted a half day continuance to permit the defense to prepare (Tr. 45).

counsel had also previously taken Jones' deposition (Tr. 90).[3]

Petitioner contends that it was error not to have required the prosecution to try Jones first so that he would have been available to petitioner as a witness. In *United States* v. *Echeles*, 352 F. 2d 892, 897-898 (C.A. 7), relied upon by petitioner (Pet. 11), the court held that a severance should have been granted as to a co-defendant where the defendant had made known his intention to call the co-defendant as a witness, and the co-defendant had evidenced a willingness to testify in exculpation of the defendant. The court indicated that, after granting the severance, the trial judge should have ordered the co-defendant tried first. The instant case differs from *Echeles* because here the trial judge was not informed prior to trial of petitioner's intention to call Jones as a witness. The courts have uniformly held that in such circumstances it is not error to deny a severance among co-defendants. *E.g.*, *United States* v. *Kahn*, 366 F. 2d 259, 263 (C.A. 2), certiorari denied, 385 U.S. 948; *Brown* v. *United States*, 375 F. 2d 310, 316 (C.A.D.C.), certiorari denied, 388 U.S. 915. *A fortiori* there would be no reason for a judge in the middle of a trial to direct a change in the order of separate trials.[4]

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[3] The nature of the purported deposition was not disclosed. Counsel did not attempt to rely on Jones' statements therein as constituting a waiver of his privilege.

[4] *Washington* v. *Texas*, 388 U.S. 14, cited by petitioner (Pet. 11), is not apposite. There the Court held only that a Texas statute *forbidding* an accomplice to testify on behalf of an ac-

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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cused was unconstitutional. Here no compulsion of law prohibited Jones from testifying for petitioner.

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